

NO. 43444-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL D. COLLINS II,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR SKAMANIA
COUNTY

THE HONORABLE BRIAN ALTMAN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Must the Court of Appeals remand this case to the trial court for a Bone-Club analysis on whether the jury questionnaires should have been sealed the day after the jury reached its verdict?
2. Does a sex offender's action in entering and remaining in a new county and thus taking on the requirements of notifying both the sheriff of the old county and the sheriff of the new county, create separate units of prosecution for the crime of Failure to Register as a Sex Offender?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On December 15, 2011, the appellant was charged by amended information with the crime of Failure to Register as a Sex Offender, CP 118-119. Specifically, the State alleged that on or between February 4, 2009 through February 9, 2009, he lacked a fixed residence and had failed to register with the Skamania County Sheriff within twenty-four hours of entering Skamania County, Id.

On the same date (December 15, 2011), the trial court heard the appellant's motion to dismiss, RP 1-23, previously filed with the court clerk, CP 1-2, along with supportive briefing, CP 3-36.

In his supportive briefing, the appellant acknowledged that on February 24, 2010, a Skamania County jury found him guilty of Attempted First Degree Felony Murder and Robbery in the First Degree for a February 9, 2009 incident in Skamania County Superior Court Case Number 09-1-00014-8. CP 3.¹ He went on to assert that the charge of Failure to Register as a Sex Offender "is based on the same 'Dougan Falls Fact Pattern' from Case No. 09-1-00014-8," Id.

Continuing the procedural history of the appellant's various criminal case, he outlined his charges in Clark County for Failure to Register as a Sex Offender and Custodial Interference, Id., asserting once again that both charges "were based on the 'Dougan Falls Fact Pattern' from Case No. 09-1-00014-8," Id. He was acquitted of Custodial Interference but pled guilty in Clark County to Failure to Register as a Sex Offender. Id.

Among other arguments in his motion to dismiss, the appellant argued to the trial court that the prosecution by Skamania County for Failure to Register as a Sex Offender was barred by double jeopardy since he was already prosecuted for the same crime in

¹ The conviction for Attempted First Degree Felony Murder was reversed by the Court of Appeals, which remanded the appellant back to Skamania County

Clark County, CP 9-10. He argued that the Clark County case and the Skamania County case encompassed only one unit of prosecution, CP 10-12. This is substantially the same argument the appellant is currently making to the Court of Appeals, Appellant's Brief at 10-14.

In reply, the State argued that in fact, the Failure to Register as a Sex Offender charge to which the appellant had pled guilty in Clark County was for a time period in 2006, long before the 2009 dates at issue here. RP 11-13. However, the appellant's trial counsel pointed out that these earlier dates were "a legal fiction," RP 5, based on a plea bargain whereby the appellant entered an Alford plea to the earlier time period but that the case being settled was in fact for his failure to register during the 2009 period, RP 5-9. The trial court accepted the appellant's argument on this point, RP 21-22.

The State further argued that what was being prosecuted in Skamania County was a different omission, since Clark County was charging him for having absconded from his registered address there (in Clark County) without notifying the *Clark* County Sheriff:

Superior Court for re-sentencing on the remaining conviction for Robbery in the First Degree. CP 3-4.

...[T]he statute has both requirements. That you— both have to alert the old county that you're moving, and you have to then alert the new county where you're moving to. So I think those are two different omissions.

RP 17.

The State also argued that the Clark County charge was based on a longer time period than the Skamania County charge, RP 13-14. The time period originally charged in Clark County was January 1, 2009 through March 4, 2009. See Motion and Affidavit for Order Authorizing Issuance of Warrant of Arrest in Clark County Superior Court Cause Number 09-1-00260-6, attached to the appellant's trial level brief, CP 13-15, which contains a full rendition of the facts underlying the Clark County Failure to Register charge.

The trial court agreed that the Clark County and Skamania County charges were based on two different omissions and that double jeopardy thus did not apply, RP 22. The motion to dismiss was denied. RP 22-23.

On the same date (December 15, 2011), the trial court heard the appellant's Motion for Change of Venue, RP 24-34, also previously filed with the court clerk, CP 37-39, along with supportive briefing, CP 40-117. This motion was also denied, RP 33-34.

A motion under CrR 3.5 was also heard on December 15, 2011, RP 47-75. Det. Tim Garrity and Sgt. Monty Buettner testified, RP 47-68. The trial court granted the State's motion and admitted relevant statements made by the appellant to Det .Garrity and Sgt. Buettner, RP 74-75, CP 165-168.

Motions in limine were heard on January 5, 2012. RP 80-122.

Jury trial was held January 9, 2012 to January 10, 2012, RP 152-520. The jury returned a verdict of guilty as charged, RP 523-524, CP 120.

Sentencing was held on January 12, 2012 , RP 27-546. The appellant was sentenced within the standard range, CP 121-139, 140. The appellant's motion for a new trial was denied, CP 163-164. This appeal follows. CP 141-162.

2. SUBSTANTIVE FACTS

On the dates in question, the appellant had previously been convicted of a sex offense that would be classified as a felony under the laws of Washington and was required to register as a sex offender. RP 467.

On December 5, 2008, the appellant registered to a Clark County address as a sex offender with the Clark County Sheriff. RP 436. He signed a statement that he understood the

requirements of registering as a sex offender which were printed on the back of the form. RP 437.

On December 29, 2008, the appellant's mother came to the Clark County Sheriff's Office with a handwritten note by the appellant that he was moving out of state. RP 438. This document did not meet the requirements for registration. Id.

On January 17, 2009, the appellant, his son Teven Collins, Nathan Wade Davis, and Dania Whalen left for Apple Valley, California together. RP 278-279, 305, 316-317. On February 2-3, 2009, they drove back north to Washington State, first stopping in Vancouver at the home of the appellant's brother Cory Collins, RP 279-280, 291, 305-306, 317-318, 322, 324.

Teven handed Cory a note telling Cory to meet them. RP 281. They needed Cory's help because they "had no home, . . . no car, . . . no money." RP 282. The appellant, Teven, Davis, and Whalen then left without Cory, heading toward a campground in the woods at Dougan Falls in Skamania County, Washington. RP 283, 306, 313, 332-333. The appellant and Teven were dropped off; Davis and Whalen left. RP 291, 307-308, 311, 323-324. This occurred on February 3, 2009. RP 324, 465. At the time, there was a warrant out for the appellant's arrest. RP 370.

The appellant and Teven had supplies including a blanket, some food (Top Ramen and oranges), and some clothes in a trash bag. RP 325. They then lived in the woods camping for several days near the area they were dropped off, after which they left. RP 291-292, 299.

The appellant and Teven were still there as of February 9, 2009 when they were seen there by Robert K. Tracey. RP 361-365.

The appellant later admitted to Det. Garrity that he and Teven were in Dougan Falls in Skamania County during this time period to "[l]ie low and stay away from people," RP 374-376, 391. He admitted to having seen Tracey, RP 376, someone else in a pickup truck "[a]bout two days prior" to seeing Tracey, RP 377-378. He also admitted to seeing "another guy skiing in the area a few days prior" to seeing Tracey, RP 379-380.

The appellant never registered as a sex offender in Skamania County. RP 397-398.

C. ARGUMENT

- 1. THERE IS NO NEED TO REMAND TO THE TRIAL COURT FOR ANALYZING THE SEALING OF THE JURY QUESTIONNAIRES UNDER BONE-CLUB BECAUSE JURY SELECTION WAS ENTIRELY CONDUCTED IN OPEN COURT, WITH BOTH PARTIES MAKING FULL USE OF THE QUESTIONNAIRES, THERE IS NO EVIDENCE THAT ANY MEMBER OF THE PUBLIC WAS DENIED**

**ACCESS TO THE QUESTIONNAIRES BEFORE THE
SEALING ORDER WAS ENTERED THE DAY AFTER
TRIAL WAS COMPLETED, AND THERE IS NO EVIDENCE
THAT ANY MEMBER OF THE PUBLIC EXPRESSED AN
INTEREST IN THE COMPLETED QUESTIONNAIRES.**

In State v. Bone-Club, the State Supreme Court held that before a court may close a hearing, it must perform a five-part weighing test:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

128 Wn. 2d 254, 258-259, 906 P.2d 325 (1995). The appellant argues that the trial court's having sealed the jury questionnaires used in this case without conducting a Bone-Club analysis requires this Court to remand the case back to the trial court to conduct this analysis. Appellant's Brief at 8-10.

The appellant explains how Divisions One and Two reached opposite results on this question. Appellant's Brief at 8. In State v. Beskurt, 159 Wn. App. 819, 834, 246 P.3d 580 (2011), overruled in part, 176 Wn. 2d 441, 293 P.3d 1159 (2013), Division One remanded to the trial court for a Bone-Club analysis in a similar situation.

However, since the filing of the appellant's brief, the State Supreme Court overruled Division One's remand:

To the extent juror questionnaires are within the scope of the rule, "[i]ndividual information, other than name, is presumed to be private." [citation omitted]. Anyone seeking to access this information petitions the trial court for access and must make a showing of good cause. [citation omitted] The privacy presumption of individual juror information exists until GR 31 (j) procedures are triggered and requirements are met, none of which occurred here.

State v. Beskurt, 176 Wn.2d 441, 448, 293 P.3d 1159 (2013), quoting GR 31(j). The Court further explained in a footnote that:

[n]ot every document in a court's possession is a court record subject to the rule. As utilized in this case, the completed questionnaires seem more administrative. Unlike the proposed questionnaires that were attached to the trial briefs submitted to the court, the completed ones were never filed with the court or part of the court's decision-making process. They were used as preparation only for in-court voir dire, which, as mentioned, was open. We doubt the completed questionnaires in this case qualify as court or trial records. Unless someone expressed an

interest in the completed questionnaires or a party attached a questionnaire to a motion, for example, challenging the court's decision to seat a juror, the trial court could have discarded the questionnaires following trial.

Id. n.8.

Division Two already reached essentially the same conclusion as the State Supreme Court did, rejecting Division One's conclusion in Beskurt:

After the trial was over, the trial judge ordered the jury questionnaires sealed and both parties agreed to the order. There is no evidence that jury selection did not proceed in open court. Nor is there any evidence that the court denied either party, or any member of the public, access to the questionnaires. Chouap agreed to use and did use the juror questionnaires to question prospective jurors. . . . [R]ejecting *Beskurt*, we find no error that Chouap can raise.

State v. Chouap, 170 Wn. App. 114, 129, 285 P.3d 138 (2012).²

The situation in the case at bar is similar to that in Chouap. While there is no evidence that parties ultimately agreed to sealing, this occurred only *after* the trial was completed. Initially, both parties agreed to the use of the questionnaire, RP 78-79, 107-120. Before voir dire, the completed questionnaires were "copied and given" to both attorneys, RP 141. Jury selection was entirely

² A petition for review on this case is still pending before the State Supreme Court, but given that Court's holding in Beskurt, it is likely that review will be denied or that Division Two's decision will be summarily upheld.

conducted in open court, with both parties making active use of the questionnaires, RP 152-248. There is no evidence that (before the sealing order was entered) any member of the public was denied access to the questionnaires.

In any case, these documents are not public records at all under the Supreme Court's decision in Beskurt, since they "were used as preparation only for in-court voir dire, which . . . was open," 176 Wn.2d at 448 n.8. And there is no evidence that "someone expressed an interest in the completed questionnaires," Id.

Consistent with this Court's holding in Chouap and the State Supreme Court's recent decision in Beskurt, this Court should find that there is no reason to remand the case to the trial court for a Bone-Club analysis with respect to the sealing of jury questionnaires.

2. CONSISTENT WITH THE STATED PURPOSES OF THE SEX OFFENDER REGISTRATION STATUTE, THIS COURT SHOULD HOLD THAT THE DUTIES OF A SEX OFFENDER TO REGISTER WITH THE SHERIFFS OF DIFFERENT COUNTIES DO NOT CONSTITUTE A CONTINUING COURSE OF CONDUCT AND THUS CONSTITUTE DIFFERENT UNITS OF PROSECUTION.

The appellant argues that the appellant's conviction for Failure to Register as a Sex Offender in the case at bar violates double

jeopardy because he was already prosecuted for the same offense in Clark County. Appellant's Brief at 10-14.³

However, the Skamania County conviction does not implicate double jeopardy.

The double jeopardy doctrine protects a criminal defendant from being (1) prosecuted a second time for the same offense after acquittal, (2) prosecuted a second time for the same offense after conviction, and (3) punished multiple times for the same offense.

State v. Linton, 156 Wn.2d 777, 783, 132 P.3d 127 (2006).

. . . [T]he double jeopardy analysis for multiple convictions for violating the same statute requires a determination of "what act or course of conduct ... the Legislature defined as the punishable act": "When the Legislature defines the scope of a criminal act (the unit of prosecution), double jeopardy protects a defendant from being convicted twice under the same statute for committing just one unit of the crime." [citation omitted] Where the legislature has not clearly indicated the unit of prosecution in a criminal statute, the "lack of statutory clarity favors applying the rule of lenity." [citation omitted]

State v. Graham, 153 Wn.2d 400, 404-405, 103 P.3d 1238 (2005),

quoting State v. Adel, 136 Wn.2d 629, 634-635, 965 P.2d 1072 (1998) .

³ At the trial court, the State argued that the Clark County conviction was for an entirely different period of time, namely 2006. However, the trial court accepted the appellant's argument that this was merely a legal fiction as part of a negotiated settlement with respect to charges that he failed to register in Clark County in 2009. RP 5-9, 21-22. On this appeal, the State is conceding that point.

The appellant relies heavily on the State Supreme Court's holdings in State v. Peterson that "failure to register is not an alternative means crime" and that an offender's particular "residential status is not an element of the crime of failure to register," 168 Wn.2d 763, 771, 774, 230 P.3d 588 (2010). The appellant bolsters his argument by citations to State v. Green, 156 Wn. App. 96, 101, 230 P.3d 654 (2010) ("constru[ing] the duty to register every 90 days as creating an ongoing course of conduct that cannot support separate charges") and State v. Durrett, 150 Wn. App. 402, 410, 208 P.3d 1174 (2009)("constru[ing] the failure to report weekly as an ongoing duty and . . . as a course of conduct").

However, Peterson itself contains clues that it's holding would not apply to the case at bar:

The issue before us is whether the offender's *residential status* must be proved in order to convict. Peterson also seems to claim that the particular county sheriff to which one must give notice is an element of the crime because an offender's deadline is different depending on if he moves outside of his county or within it. [citation omitted] But because the jury instruction here included the 72-hour deadline, it is clear that the sheriff identified in the instruction was the sheriff of the county in which the trial took place. [citation omitted]

Peterson, 168 Wn.2d at 771 n.7 (emphasis in original). The footnote concludes, foreshadowing the case at bar, "*Where an allegation involves a cross-county move, greater specificity may be required*," Id. (emphasis added). Durrett, too, contains the proviso that its holding applies "*at least under the facts here*," 150 Wn. App. at 410 (emphasis added).

This Court's recent discussion of Peterson in State v. Mason is highly instructive:

We caution . . . that applying our Supreme Court's reasoning in Peterson that focused solely on Peterson's narrow factual circumstances to other factual circumstances leads to results contrary to the statutory language. The statutory language clearly and expressly establishes multiple circumstances that trigger the registration requirement that do not involve moving from one residence to another (or to none) without notice. Former RCW 9A.44.130(11)(a) unequivocally states that " knowingly fail[ing] to comply with any of the requirements of this section" constitutes the crime of failure to register.

170 Wn. App. 375, 381, 285 P.3d 155 (2012)(emphasis added).

"Despite the court's broad pronouncements that residential status is not an element of failure to register," this Court went on to conclude, "*its holding is limited to the facts of Peterson's case*," Id. at 383 (emphasis added).

Just as forms of conduct other than moving that violate the sex offender registration statute are distinguishable from the situation in Peterson, See Mason, 170 Wn. App. at 381-382, moving from one county to another is also distinguishable. In that case, unlike in the situations discussed in Durrett and Green, the offender's own actions create two very different obligations with different deadlines:

Any person who lacks a fixed residence and leaves the county in which he or she is registered and enters and remains within a new county for twenty-four hours is required to register with the county sheriff not more than twenty-four hours after entering the county . . .

. . .

Any person required to register under this section who lacks a fixed residence shall provide signed written notice to the sheriff of the county where he or she last registered within forty-eight hours excluding weekends and holidays after ceasing to have a fixed residence. . . . The sheriff shall forward this information to the sheriff of the county in which the person intends to reside, if the person intends to reside in another county.

Former RCW 9A.44.130(4)(a)(vii) (2006) and Former RCW 9A.44.130(6)(a) (2006).

To construe these requirements as the same course of conduct would essentially give a sex offender *carte blanche*, once he or she had already initially moved without notifying the previous county sheriff, to wander from county to county without facing any

additional sanction. This cannot be the Legislature's intent. As the State Supreme Court recognized in Peterson:

The purpose of the sex offender registration statute is to aid law enforcement in keeping communities safe by requiring offenders to divulge their presence *in a particular jurisdiction*.

168 Wn.2d at 773-774 (emphasis added).

Each county prosecutor and *each* county sheriff has a separate interest in tracking sex offenders residing in their respective communities. This has been reiterated time and time again and is the reason why registration is done by *county*, not through a state agency:

"The legislature finds that sex offenders often pose a high risk of reoffense, and that law enforcement's efforts to protect their communities, conduct investigations, and quickly apprehend offenders who commit sex offenses, are impaired by the lack of information available to law enforcement agencies about convicted sex offenders *who live within the law enforcement agency's jurisdiction*. Therefore, this state's policy is to assist *local* law enforcement agencies' efforts to protect *their* communities by regulating sex offenders by requiring sex offenders to register with *local* law enforcement agencies as provided in section 402 of this act."

LAWS of 1990, ch. 3 § 401, quoted in State v. Watson, 160 Wn.2d 1, 9, 154 P.3d 909 (2007)(emphasis added).

As Prospective Juror Number 51 stated in the case at bar:

I think that any time they -- I mean, their county, they -- other counties need to be informed if there's someone with that kind of history in their area so they'll know what to do if it happens.

RP 219-220.

The egregious facts of the various cases involving this appellant prove the point. As the prosecutor pointed out at sentencing:

[A]lthough this was a crime separate and apart from the assault and robbery of Mr. Tracey, nevertheless it takes on enhanced seriousness because of the crime, in the sense that if he [i.e., the appellant] had lived up to the obligation to register as a sex offender . . . this crime [i.e. the robbery and near murder of Mr. Tracey] likely would never have occurred...

RP 534-535.

Clearly, it was not the Legislature's intent to tie the hands of local prosecutors and local sheriffs by not making sex offenders additionally accountable for their own actions of moving from one county to another without registering with that particular county's sheriff. *Each* prosecutor and *each* sheriff has an independent duty to protect his or her own citizens that the Legislature meant to support.

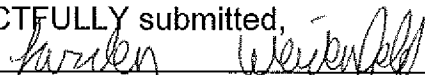
In what amounts to an issue of first impression, this Court should hold that the duties to register with various county sheriffs,

duties that are created by the actions of the sex offenders themselves by moving from one county to another, do not constitute one course of conduct and are thus separate units of prosecution.

D. CONCLUSION

For the above reasons, the appellant's conviction in Skamania County for Failure to Register as a Sex Offender should be upheld as not violating double jeopardy. Furthermore, the case should not be remanded to the trial court for a Bone-Club analysis on the sealing of the jury questionnaires.

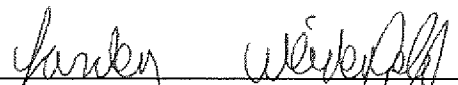
DATED this 12th day of April, 2013.

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CERTIFICATE OF SERVICE

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